



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Jones

Respondent: Cambridge Curwen Print Study Centre Ltd

HEARD AT: Bury St Edmunds ET **ON:** 6th, 7th, 8th February 2017
(Hearing)
24th February 2017
(In Chambers)

BEFORE: Employment Judge Laidler

REPRESENTATION

For the Claimant: Ms S Ismail (Counsel)

For the Respondents: Ms R White (Counsel)

RESERVED JUDGMENT

1. The Claimant was never given a written statement of terms and conditions of employment and the Respondent was in breach of Section 1 of the Employment Rights Act 1996.
2. There was no fundamental breach of the express or implied terms of the contract of employment such as to entitle the Claimant to resign and the claim of constructive unfair dismissal fails and is dismissed.

REASONS

1. This is the claim of Susan Jones arising out of her employment by the Respondent. The claim was received on 23rd May 2016 in which the

Claimant brought a claim of constructive unfair dismissal and failure to provide a written statement of particulars of employment in accordance with section 1 of the Employment Rights Act 1996 (ERA).

2. In its response, received on 23rd June 2016 the Respondents denied all of the claims.
3. For this Hearing the representatives had agreed a list of issues as follows:

Liability

Unfair Dismissal

3.1 C resigned by e-mail on 2.3.16.

3.2 Was C constructively dismissed in accordance with ERA 1996 s95(1)(c)?

C relies on a breach of the implied terms of trust and confidence.

3.3 The pleaded breaches are

3.3.1 By Lorraine Chitson:

- i) From 2012: failing to confirm the contractual terms of C's employment;
- ii) September 2015: failing to allow C to proof read an article in which she was quoted;
- iii) October/November 2015: failing adequately to support C in respect of an issue with a Spanish student;
- iv) October/November 2015: misrepresenting the issues re the Spanish student by informing the Board of trustees that C had planned to stage a walk out, that being untrue and it being unsupportive and misrepresentative of C's position;
- v) 15th December 2015: allocating only 2/3 days work to C and informing C they did not have the work for her;
- vi) Denying C had a contract to work 4 days a week;
- vii) December 2015: allocating work to freelance staff in preference to C;
- viii) December 2015: putting her hand towards C's face in a threatening manner in order to stop a conversation;
- ix) Manipulating the issues relating to technician pay and accusing C of spoiling everything;
- x) February 2016: without consultation giving C's work to Anne Pit on one day a month and expecting C to work extra days in the summer holidays to make up the time;

- xi) Requiring C to change her day off 3 times in 7 weeks, LC being deliberately awkward and difficult;
- xii) 1st March 2016: requiring C to fill a skip in the rain and prior to a meeting with the Trustees, LC being deliberately awkward and difficult;

3.3.2 By the Trustees:

- i) Informing C she would not be given a salary or contract of employment for 4 days a week;
- ii) Being lied to, harassed, not valued and used.

3.4 If C was constructively dismissed, R admits that dismissal was unfair, contrary to ERA 1996 s94.

Statement of Particulars

3.5 R admits that at no time during her employment was C provided with a statement of particulars of her employment, contrary to ERA 1996 s1.

Remedy

3.6 If C is found to have been unfairly dismissed, to what compensation is she entitled?

3.7 If C is found to have been unfairly dismissed, to what additional compensation is she entitled for the failure to give a statement of particulars in accordance with EA 2002 s38?

4. The matter had been listed for 3 days. It was only possible to hear the evidence within that time and orders were therefore made for the exchange of written submissions.

5. The Tribunal heard from the Claimant and her husband, Arwyn Jones. In the Claimant's witness statement, there were several sections that had been highlighted in bold type referring to extracts in the bundle and diaries that the Tribunal did not have. This was clarified on the first day of the Hearing and a redacted statement prepared deleting all those bold references.

6. On behalf of the Respondent the Tribunal heard from: -

- a. Lorraine Chitson, Director
- b. Emma James, Tutor
- c. Jennifer Scott-Reed (of Scott Reed Solutions Limited)
- d. Chloe Cheese, Trustee
- e. Karina Savage, Tutor
- f. Anne Pitt, Tutor

7. The Respondent had also served the following statements:

- a. Feroze Amroliwala
- b. Lisa Wilkens
- c. Mark Hannam
- d. David Porter, Trustee
- e. Hannah Webb

None of these witnesses attended the Hearing to be cross examined and the Tribunal did not have signed witness statements. Although the Respondent's counsel stated at the end of the evidence that these witness statements were still tendered as evidence, the Tribunal has not given them any weight bearing in mind it did not hear from the witnesses.

8. The Respondents sought leave to call Jennifer Scott-Reed to answer some points made by the Claimant in her witness statement. No issue was taken about introducing this by the Claimant's representative and the witness was called.

9. There was another issue about the Respondent's witness statements which did not become clear until part way through the cross examination of Karina Savage. All the Respondent's witness statements had references at the ends of each paragraph to other witness statements or documents in the bundle. Ms Savage stated and then Louise Chitson confirmed that these were references that had been added by her and not the witnesses. The effect of this appeared then to be that the witnesses had not seen those references when they prepared their statements but the lighter text had been added afterwards by Ms Chitson referring to documents that she felt were relevant. On taking further instructions, the Respondent's counsel advised that certain advice had been given to Ms Chitson about cross referencing witness statements which had been misinterpreted and the lighter text added in by her. The Judge expressed her concern at this and how inappropriate it was. It was agreed that the Claimant's representative would not need to cross examine on that lighter text.

The Facts

10. On the evidence heard the Tribunal finds the following facts.

11. The Claimant commenced employment in 1999 and at the time was the only employee. The Respondent is a charity limited by guarantee that runs print making courses. When the Claimant first started at the centre she was engaged with not only teaching but all the technical duties. She would prepare the studio for other tutors and work as a technician for them. When not teaching herself, she would do this technical work. It has become clear in hearing the evidence that all the technical and any non-teaching work has been referred to as administration ('admin').

Administration clearly, in the context of this case, does not just mean paperwork in an office but all aspects of organising the studio other than teaching in it.

12. The Claimant taught students and did all the paperwork in relation to managing the studio. She taught artists and bursary students.
13. In or about 2001, the title of Lead Tutor and Studio Manager started to be used in relation to the Claimant as other freelance tutors were coming into the studio to help with school groups.
14. There has been no dispute that the Claimant was responsible for drafting and writing a lot of the paperwork connected with the courses and the studio. For example, she developed and delivered the content of the Certificate in Print Making Skills offered by the centre and designed and printed the certificates themselves. She worked with schools and other organisations in relation to their print studies and developed and wrote courses along with workshop notes.
15. The Respondent has accepted in these proceedings that the Claimant was never given a written statement of terms and conditions. The Tribunal has not seen any written documentation of the terms upon which she started.
16. The Tribunal did, however, see payslips in the bundle going back to the 31st July 2001. Certainly, from that time, the Claimant was being paid on a PAYE basis with tax and national insurance deducted and the payslips show that she was paid by the hours for the hours worked.
17. Letters are also in the bundle from the then Chair of the Trustees, Stanley Jones, thanking the Claimant for her hard work and agreeing an increase in “salary” by varying percentages. There was one at page 627 giving an increase of 5% to £11.50 per hour with effect from 1st July with the Claimant given two weeks paid holiday per calendar year with effect from 2008. The letter is undated however. There were other similar letters seen which were dated, namely,
 - i) 26th January 2012 – giving a salary increase from 1st January 2012 of 5.2% taking the Claimant’s hourly rate to £13.05.
 - ii) 12th December 2012 – an increase from 1st January 2013 of 3.5% taking the new hourly rate to £13.50.
 - iii) 28th January 2015 - an increase of 3% taking the Claimant’s hourly rate from 1st January 2015 to £14.70.
18. In all the letters the then Chairman (in those latter letters Terry Hanby) thanked the Claimant for her “hard work and commitment” which they had no doubt had “certainly contributed to our exceptional income and

continued success". These letters all came from Terry Hanby, Chairman and not from Lorraine Chitson.

19. Copies of the Claimant's P60s were also seen in the bundle. These give a good illustration of how the Claimant's earnings increased (even considering an increase in hourly rate). These showed as follows: -

- i) Year to 5th April 2002 – gross earnings £2,134.27.
- ii) Year to 5th April 2003 – gross earnings £3,875.54.
- iii) Year to 5th April 2004 – gross earnings £6,795.38.
- iv) Year to 5th April 2005 – gross earnings £9,393.75.
- v) Year to 5th April 2006 – gross earnings £10,248.03.
- vi) Year to 5th April 2007 – gross earnings £11,199.58
- vii) Year to 5th April 2008 – gross earnings £13,676.06.
- viii) Year to 5th April 2009 – gross earnings £13,924.14.
- ix) Year to 5th April 2010 – gross earnings £15, 468.38.
- x) Year to 5th April 2011 – gross earnings £16, 970.30.
- xi) Year to 5th April 2012 – gross earnings £17,549.74
- xii) Year to 5th April 2013 – gross earnings £18,349.11
- xiii) Year to 5th April 2014 – gross earnings £20,834.91

20. Also in the bundle were some handwritten documents showing the hours worked by the Claimant and the tasks that she was engaged in. These were in the Claimant's writing and it was she who wrote the work that she had done in the diary. From these it was very rare for the Claimant's hours to be much lower than 6 hours per day and invariably they were much higher. There are occasions when only 4 or 5 hours has been noted but as stated, that was rare.

21. In cross examination, Counsel put to the Claimant that she was on a zero-hour's contract. That is the first time that any such expression was ever used and this tribunal has no evidence before it that that was indeed what was agreed between the parties. In fact, the reality shows otherwise in that as demonstrated above from the Respondent's own documents the Claimant was on average working 6 hours a day and from her gross earnings it can be seen her hours were increasing.

22. The Claimant expressed a desire not to work Monday's so she could assist her daughter with childcare. A handwritten note to this effect was seen in the centre diary for 5 January 2015 stating 'Please avoid Mondays for SJ in 2015'.

23. The tribunal saw at pages 308/1 to 23 handwritten records of the Claimant's hours each day she worked. This recorded the certificate, a school or course. 'Admin' was regularly noted. The tribunal accepts from the evidence heard that admin could be something done as part of setting up or delivering a course on a given day or could be a stand-alone day when the Claimant was not teaching. The Respondent is a small charity dependent on fee income. Lorraine Chitson obtained approval from the trustees for up to 12 admin days a year not backed

- up by fee income. This was not something she could agree but required trustee approval. This was seen by Lorraine Chitson as a positive development having an allocation of 12 days for admin but she wanted it used evenly throughout the year. This budget is confirmed in minutes of the trustees meeting on 1 March 2016 (p322) where it is confirmed that Lorraine Chitson told the meeting that the Claimant had been doing admin as part of her role and that she 'was paid at lead tutor rate for 1 Admin day month'. That is not to say the Claimant was not involved in other admin work but that would have been covered by fees charged for a course.
24. The tribunal accepts Lorraine Chitson's evidence that she had a written letter of appointment and assumed the Claimant had also. As far as she was aware they both had written contracts. She denies stating that the Claimant had an unwritten contract for 4 days a week and the tribunal accepts her evidence. She did not have access to personnel files and this was the responsibility of the trustees. The correspondence shows that the Claimant had direct access to Terry Handy to discuss such matters.
25. The following allegations from the list of issues are made against Lorraine Chitson and are relied upon as showing a breach of the implied term of trust and confidence and not a breach of any express term of the contract. The tribunal did find that the Claimant tended to use over emotive language which she could not then substantiate. In the list of issues as against the trustees the second issue was that she had been 'lied to, harassed, not valued and used'. When cross examined she accepted they had not lied, harassed her or used her but she had felt they didn't value her.

Allegations against Lorraine Chitson

From 2012 failing to confirm the contractual terms of the Claimant's employment

26. Lorraine Chitson became the part-time director of the Respondent in July 2001. At that time she was the only person employed on a salaried basis. The Claimant was already working for the Respondent.
27. As the studio developed others were used on a freelance basis when needed. The Respondent had no other source of money than from course fees so it always needed to ensure it had sufficient course income to pay staff.
28. The tribunal has not found evidence that Lorraine Chitson failed to confirm the Claimant's contract from 2012. It accepts her evidence however that she was not responsible for contracts and it was a matter for the trustees. The fact is that the Claimant continued to work for the Respondent quite satisfactorily and did not resign at that time.

September 2015, failing to allow Claimant to proof read an article in which she was quoted.

29. The Claimant sets out this matter in her witness statement at paragraph 6 and asserts that Lorraine Chitson had quoted her in a national magazine "Print Making Today" without giving her the opportunity to proof read the article. It contained a quote from the Claimant which "didn't make sense and had other inaccuracies". The Claimant states that she was upset that Lorraine had not let her proof read the article before it was printed as she had been quoted and they worked together closely in a small office. The first she knew was when the article was published. When she pointed this out to Lorraine Chitson she alleges the reply was that she had been too busy to let the Claimant proof read it.
30. The tribunal saw the relevant article at page 529 of the bundle and it is headed "Rural Masterclass". The reporter had visited the Centre to "discover how they are preserving and developing the legacy of the Curwen Press in Cambridgeshire". It referred to the Centre sending out a resident artist to work with the school usually for an extended period and went on: -

"Currently, Sue Jones has been at Perse School in Cambridge for nearly three months "Some schools will want to work on something final, something large" Jones says "and push the technique to the nth degree". For example, at Long Road Sixth Form College students worked on a "collaboration impressionist" project as its theme "it just depends on what is available i.e. they might be able to do lino, but they don't have the equipment for intaglio so we can help them toward final pieces of work".

31. In cross-examination, the Claimant said when pressed to answer the question that there was nothing detrimental to her in that article. When asked in cross-examination about it Lorraine Chitson stated that she had not seen anything that was not factually correct in it. In view of the Claimant's lack of explanation in cross examination the tribunal accepts the evidence of Miss Chitson.

October/November 2015 failing adequately to support the Claimant in respect of an issue with a Spanish student

32. The Claimant explains this incident in her witness statement stating she had to deal with a very "rude, arrogant and difficult 37-year-old Spanish pharmacist who was studying Printmaking with a bad attitude and her husband." The student was called Cristina Prieto who had come to this Centre as a studio assistant. The Claimant deals with this issue in her witness statement from paragraphs 8 to 17. It is quite clear from the statement of Lorraine Chitson as well that Cristina was not easy to work with. Miss Chitson confirms that Anne Pit came to see her in

confidence to make her aware that whilst Cristina was quite demanding in wanting to meet her needs difficulties were arising between her and the Claimant. As the Claimant explains in her witness statement matters culminated in a difficult situation when the Claimant went to collect Cristina from the bus stop (as Lorraine Chitson was unable to do so) and was confronted by Cristina's husband who no doubt was acting inappropriately. The Claimant accepted in evidence that Lorraine Chitson acknowledged that the husband had behaved inappropriately.

33. The tribunal accepts that Miss Chitson took advice from the trustees as to how to deal with the situation. The Claimant had made it known to Lorraine Chitson that she would not be able to work with Cristina. However, by email of 8 November, the Claimant wrote to Lorraine Chitson that she realised her earlier requests "are not workable or good for the Studio". She could not let Cristina walk home in the rain and would give her lifts to and from the Studio as long as she guaranteed her husband would not open her car door to confront her if he had a problem. She also realised that taking herself out of the Studio for "that amount of time will cause a lot of problems" but she wanted her contact with Cristina limited. Four days with Cristina was too much. She would work with her but was not prepared to have every working day with her as it was too stressful. She hoped this would help the situation as it was "the best I can do".
34. It was put to her in cross-examination that the problem was then over. The Claimant stated that Cristina was still unpleasant to her and that Lorraine Chitson should have got an assurance from Cristina that the incident with her husband would not happen again. She was still expected to give Cristina a lift. The Judge asked the Claimant why she had not just told Lorraine Chitson she would not pick Cristina up again and she could not really say why but she had not done. From the evidence heard the tribunal is satisfied that Lorraine Chitson dealt with the matter as best she could. In all of the circumstances as described she did not fail to support the Claimant adequately .

October/November 2015, misrepresenting the issues re: the Spanish student by informing the Board of Trustees the Claimant had planned to stage a walk out being untrue and it being unsupportive and misrepresentative of Claimant's position

35. Cristina gave the Studio a month's notice that she would be leaving on 19th November 2015, because she could not afford the rent that she had to pay. There was a telephone conversation between the Claimant and Lorraine Chitson on 5th November 2015 (the incident about the car and the husband being on 4th November). The Claimant's evidence is that she was too stressed to work with Cristina any more. She disputes that she said she would be off for 6 weeks as she already knew that Cristina was leaving.

36. The tribunal however, saw some handwritten notes that Lorraine Chitson had prepared written on a copy of the email of 5th November, seen at page 346 of the bundle. She confirmed these notes were written after the event when it became a problem. She denies that she had ever suggested the Claimant “staged a walk out”. What she records in the handwritten notes however, is that when the Claimant telephoned her on the day after the incident she said words to the effect that “If I did not “sack” Cristina she is not coming to work for next 6 weeks”. The notes also record that she needed to speak to the Trustees about the Claimant “non working” as it had implications for the Charity. On the evening of 5th November, the Claimant changed her mind.
37. Whilst acknowledging that the Claimant’s husband also gave evidence to this tribunal to the effect that the Claimant had not said 6 weeks, but that she had said that she was going off work sick with stress, the tribunal is satisfied that the Claimant had suggested she would not be back for 6 weeks and this then led to her “re-assessing” the situation and confirming in her email at 19.01 on 5th November, that she accepted her ‘earlier requests are not workable or good for the studio.’ That confirms the evidence of Miss Chitson that the Claimant and/or her husband had indeed suggested that Cristina should be sacked and that the Claimant was not going to come to work. The tribunal does not therefore accept that Miss Chitson mis-represented the situation to the Trustees but that she had to explain to the Trustees that the Claimant had given this ultimatum.

15th December 2015, allocating only 2 or 3 days work to the Claimant and informing the Claimant they did not have the work for her.

38. The claimant asserts at paragraph 22 of her witness statement that on 15 December 2015, she noticed she had only 2 or 3 days work per week in the diary for a 2 month period in 2016, whilst other freelance tutors were teaching their specialist techniques. She asserts that when this had happened in the past she had made up her 4 days by working in the office doing administration, technical duties, personal development or developing on new workshops. When she pointed this out to Lorraine Chitson she says that Lorraine Chitson stated they did not have work for her.

39. The claimant then emailed Terry Hanby on 15 December, referring to an attempt to meet earlier in the year about her written contract, but that appointment being cancelled. She asked whether they could meet in the New Year to discuss this further as she was concerned “about my days of work and income being eroded. Lorraine mentioned that because I was paid hourly, that I possibly didn’t have a contract for 4 days’ work. This is very worrying and I really need my position to be clarified and placed on an official footing”.

40. Mr Hanby replied that he was around for most of January and asked her to suggest 2 or 3 days that would be convenient for her.

41. By email of 17 December, the claimant advised Terry Hanby that she had given her verbal resignation to Lorraine the previous day. She stated: -

“This is because I have felt my unwritten contract was not being honoured, this is not the only issue, but the main concern currently. I would like to talk to you before Christmas. I think its important both for the Study Centre and myself ...

... I found my work days for 2016 are unpredictable with the possibility of days changing, closer to the dates currently booked in the diary which means I have now no control over my forward planning.

I am back in the office doing admin on January 12th.

Lorraine has communicated the offer of a salaried position but the details are not clear and I would like you to be confirm these with you me [sic] to enable me to make a decision. I am passionate about the Study Centre and do not wish to leave but this situation has caused me a lot of grief and stress...”

42. It appears the claimant and Terry Hanby met on 21 December 2015. In the bundle at page 315, are some notes attributed to Mr Hanby dated 11 March 2016. The tribunal did not hear from him. The notes suggest the claimant wanted a 4 day a week contract and Mr Hanby said he was prepared to consider this but could not confirm anything until had had agreed a job description with her and agreed any contract with the other Trustees. The claimant he says asked if he could guarantee her a certain number of days in any one year. He said that any agreement would be on the basis she would deliver the job requirements as specified in the job description in exchange for which they would pay her an agreed sum of money over any 12 month period and if she wanted that in 12 equal instalments he did not see that would be a problem. He undertook to prepare a job description and present this to the claimant and the claimant offered to send one that had been prepared previously which she did on 27 January 2016. The note records that unfortunately due to circumstances relating to the death of his sister some 12 months earlier which were taking up an increasing amount of his time, he reluctantly decided to resign which he did on 9 February 2016, before he was able to complete the job description.

43. The Claimant did not proceed with her resignation and again continued to work for the Respondent. Lorraine Chitson's position is set out below.

Denying Claimant had a contract to work 4 days a week.

December 2015, allocating work to freelance staff in preference to Claimant.

44. The Claimant acknowledged in an email of 30 November 2015 to colleagues that 'the diary looks slim at the moment, it probably will change.' She asserts at paragraph 22 of her witness statement that on 15th December 2015, she noticed she had only 2 or 3 days work per week in the diary for a 2 month period in 2016, whilst other freelance tutors were teaching their specialist techniques. She asserts that when this had happened in the past she had made up her 4 days by working in the office doing administration, technical duties, personal development or developing on new workshops. When she pointed this out to Lorraine Chitson she says that Lorraine Chitson stated they did not have work for her.
45. Lorraine Chitson's position in evidence was that before Christmas for January to March there were not lots of days booked. As their work is concerned with schools and education the schools do not start contacting them until the New Year when staff were then booked against bookings. It looked as if they would have lots of empty days, but she fully appreciated the Claimant did not want to work on a Monday and that was not an issue. If work came in on a Monday, as always the Claimant was given priority but she had the right to refuse. Lorraine Chitson acknowledged that she knew that not working on a Monday was her preference but that she would merely offer her the work if it was available.
46. The Tribunal was taken through the pages 308/1-22 and can see that admin days are recorded. From the evidence heard however it cannot conclude that the Claimant was given an 'admin' day if there was no work to make up her 4 days a week. The admin days are not regular and some weeks the Claimant worked 5 days with no admin. It clearly depended on the needs of the business and what courses and other activities were booked. The Claimant was required to be flexible within those demands.

December 2015, putting her hand towards Claimant's face in a threatening manner in order to stop a conversation.

47. Lorraine Chitson confirms that she did put her hand up as the Claimant was continually talking and would not let her say anything whilst they were trying to discuss the Claimant's hours. She did put her hand up to ask the Claimant to stop as she couldn't get her to stop. The Claimant was concerned about the days booked for 2016. From the evidence heard the tribunal does not accept this was 'threatening' and is an example of the Claimant using emotive language that is not substantiated.

48. The Claimant emailed Emma James on 16th December (page 436) regarding this matter. She asserted that Lorraine Chitson was changing her working days, ignoring her request to day off (Monday) and that she had no idea of when her days off would be.

Manipulating the issues relating to technician's pay and accusing Claimant of spoiling everything

49. The Tribunal accepts the evidence of Lorraine Chitson that the issue of technician support in the studio had been an ongoing debate. The Claimant wanted a technician at least weekly. It had been twice a month plus volunteer help. At the Staff Meeting on 24th February 2015 (page 348 of the bundle) this was raised by the Claimant. She asked if it could be added to the list of fundraising objectives. Lorraine Chitson is noted as saying that 'finances did not allow for additional cost in this area this year. Staff salary increases for 2015 included an additional day per month for technician, now 2 per month, plus awarding staff an above inflation increase meant that now more technician paid hours were not possible.' She emphasised that Terry Hanby had worked hard to ensure that yearly pay increases were always above inflation. Tutors at the meeting stated they would have preferred to not have any pay increase and used the money for additional technician time. A note was made that that was a choice that could implemented the following year should all the staff agree. There was further discussion regarding the technician role and use of volunteers.

50. The Tribunal saw an email from Emma James to Terry Hanby on the 18th December 2015 dealing with other matters but also stating:-

"If you and the other trustees are considering a pay rise for the Tutors – then I am not in anyway assuming this will be the case at all so please don't think I am – obviously, I can't speak for the other Tutors, but I just wanted to say again that I would prefer for me to stay at the same rate and for any increased monies to be put towards extra technician hours.

This is what I feel would be of more benefit to the studio and us working as well."

51. The Claimant replied to Emma James and Terry Hanby that she would be happy to have no pay rise and have the monies used for a technician also.
52. In an email of 20th January 2016 to the staff Lorraine Chitson stated that it was the time of year when the Trustee Board reviewed salary rates. The proposal was very likely to be increase hourly rates by 20% per hour. Some people had expressed an interest in that years

increase being used to increase technician days in the studio instead. She went:-

“This email is to gauge opinion to this in a confidential way with no one being aware of responses other than me. ... Please can you let me know your thoughts/preference by either replying to this email after Thursday this week so only I can see replies which will then be deleted or text me including your name ...”

53. In an email of 25th January 2016 again to all the staff Lorraine Chitson said she had been asked what difference it would make to the number of technician days in the studio should the consensus be to forgo a pay increase that year. She stated:-

“At the moment we have a paid technician two days a month – this would increase to a paid technician one day every week.”

54. She also wrote to the Claimant direct stating that she needed to discuss the feedback as several questions had arisen. She did not want to answer the questions about how many days and who would get the work without reference to the Claimant.

55. Having discussed the matter with the Claimant who was adamant that the hours should go to the same person Lorraine Chitson emailed all staff accordingly on the 26th January 2016. She said that she had discussed the situation with Sue at length as to how they should use the additional 2 days a month, and reminded everyone they already employed Anne for two days a month to work as a technician, a role she performed well. The preference from the studio perspective would be to have the same person fulfilling the role for continuity and to allow them to take ownership of the studio needs. There would also be the opportunity for tutors to request technician support when teaching on demanding courses. She asked if they had any questions to come back to her confidentially.

56. The next day, the 27th January 2016 the Claimant emailed Lorraine Chitson saying “I have changed my mind and do not want to forgo the pay rise”.

57. Subsequently Lorraine Chitson discussed the matter with Terry Hanby who stated that the monies would go on staff increase in hourly rate and not technician days, as the Respondent could not currently afford both. There is no evidence she accused the Claimant of ‘spoiling everything’ or manipulating this issue.

58. In her witness statement the Claimant relies on what Lorraine Chitson said in the response to the Claimant’s grievance. That is recorded in a letter of the 14th April 2016 from David Porter in response to the Claimant’s grievance that was raised after her resignation. It cannot therefore go to the reason why the Claimant resigned. The Claimant’s

whole emphasis in her witness statement is Lorraine Chitson trying to “make me look bad in her replies to the grievance response”, that again that is after the Claimant’s resignation.

59. The Claimant also relies upon Lorraine Chitson buying a new press at about the same time as the issue of the technician’s pay. The Claimant gave evidence that she was in the office with Lorraine Chitson when an issue arose not only about the Technician’s pay but also about buying the press and the Claimant said she put “two and two together” and told Lorraine Chitson it didn’t look good to be buying a press at the same time as asking Tutors not to take a pay rise. The Claimant emailed Emma James on the 23rd January 2016 saying she had seen the press that she was buying from Janet Hemingway on the Respondent’s Facebook page and asked if Emma was not now buying it. On finding out it was unavailable she emailed Lorraine Chitson on the 24th January 2016 to say that “Curwen should buy it to replace the Bailey. It’s £1,200 plus delivery of £175”. Lorraine Chitson’s evidence which the Tribunal accepts is that she knew they did not have the budget for this but she felt under pressure from the Claimant. She referred the matter to Terry Hanby for guidance and he refused to countenance this in an email to her on the 27th January 2016.

February 2016: without consultation giving C’s work to Anne Pitt on one day a month and expecting C to work extra days in the summer holidays to make up the time;

60. In an email of the 24th February 2016 Lorraine Chitson wrote to the Claimant about a group called Inkus – a group of artists that used the studio. They had discussed the implications of one of their group not attending while he was going through his cancer treatment. The cost of them continuing as a group of just 5 takes it above normal open access day rates. They obviously didn’t want to pay that. They discussed coming to normal Saturday sessions and cancelling the current Wednesdays completely but for various reasons that was not liked. They didn’t want to recruit someone else as they were hoping to keep the gentleman’s place open for him. Anne Pitt had suggested rejoining the group which they were pleased about and acting as technician for the day but also doing her own printing as part of the group. She got the day free as she would be acting as technician and the Respondent would not pay her which meant the group could continue at the same rate as there was no staff cost attached to the day. She stated “the most important thing is we do not loose them as a group because they have been with us for such a long time and hopefully Phil will return and we can review situation”. She appreciated this would normally be one day a month that the Claimant would work but she thought it was a good solution in light of the current situation. She was happy to look at future weeks over the summer holidays when the Claimant was not needed for childcare. The Claimant could work 5 days a week. The Claimant was annoyed by this as she considered

it was done without consultation with her. Some of her work days would be moved and she was expected to work a longer week over a longer period of time and re-arrange other commitments to accommodate the changes. She felt “undervalued and disrespected by this” (paragraph 44).

61. The Tribunal accepts that Lorraine Chitson was attempting to consult with the Claimant by virtue of this email. It was temporary to try an accommodate somebody potentially with terminal cancer. All were very upset about that and they were trying to accommodate him and the group.

Requiring C to change her day off 3 times in 7 weeks, LC being deliberately awkward and difficult;

62. To a large extent this relates to the filling the skip matter which is dealt with below. In an email of the 16th December 2015 the Claimant wrote to Emma James with concerns she had about what she described as “an even worse relationship between Lorraine and myself”. She asked for the telephone number of a contact of Emma’s clearly to obtain advice. She went on “Lorraine seems to think it is ok to now possibly change my working days, ignoring my requested day off that I have taken for the last 20 months and make me work on a Monday but she will decide closer to those dates. So I now have no idea of when my days off will be which I pointed out was very unreasonable and unfair since it was 3 months away”.
63. In an email of the 24th February page 229E the Claimant again wrote to Emma James saying “I feel I can’t fight these battles anymore or work in this atmosphere”.
64. Counsel for the Claimant says these should be relied upon as examples of how distressed and anxious the Claimant had become, and contemporaneous record of the position she found herself in. However the tribunal does not find that the Claimants interpretation of the skip matter to be an accurate one

1st March 2016: requiring C to fill a skip in the rain and prior to a meeting with the Trustees, LC being deliberately awkward and difficult;

65. The Claimant states at paragraph 46 of her witness statement that Lorraine Chitson asked her to change another day from an admin day working in the office on the 1st March 2016 to filling a skip outside. The Claimant says she agreed but felt that her working days were being made more difficult and awkward. She asserts that there was no need for this work to be carried out at that time of the year and it could have been done by another member of staff at a lower rate of pay. It was in the pouring rain and on a day she had planned to have a meeting with trustees.

66. The Tribunal however heard from Karina Savage who was asked by Lorraine Chitson specifically to fill the skip. She was aware the Claimant was going to be in the studio as a course was going on and she would be working on the skip and asking the Claimant her opinion as to what was to go in it. She did not recall a torrential downpour nor wearing a coat but did accept it had been damp, drizzly, miserable weather. There was an overhanging roof so the gap was no more than a few feet and she did not end up getting wet.
67. Lorraine Chitson's evidence was that they were using a vacant part of the building following a complete redecoration of the studio and quite a number of things had been moved into it and not put back into the studio as they were not needed. The Claimant had asked that nothing be thrown away without her say so. The Respondent paid no rent for the space next door and was under pressure to make sure that they inhabited a smaller space there as possible. The idea was that the Claimant and Karina Savage were to say what could and could not be kept and put in the skip. There was an element of urgency in that Lorraine Chitson had been asked by the Landlord as to sort out what was theirs as the landlord had been showing people round the studio and the Respondent had to act professionally. They were responding to a need by the Landlord and this was a reasonable request of the employer.

Allegations against the Trustees

Meeting with the Trustees 1 March 2016

68. The Claimant's representative asserts that the meeting with the Trustees was the last straw. This was a meeting on the 1st March 2016. The Claimant explained in oral evidence that this meeting was the last straw as the Trustees refused to acknowledge her contract. It was she said the 'lie' she had been told. She had been told that she had a 4 day unwritten contract by Lorraine Chitson. She realised however at this meeting that there was no one there who cared and she had been lied to and used.
69. The tribunal heard from Chloe Cheese one of the trustees at that meeting. Her witness statement virtually mirrored a note she had prepared on the 5 July 2016 (page 321) which she believed had been written in response to the Claimant's grievance. Terry Hanby had resigned on the 9 February 2016 so this meeting was dealt with by Stanley Jones and Chloe Cheese before a trustees meeting that day. The tribunal accepts her evidence that they were trying to reassure the Claimant that she was valued. They were to take the Claimants request for a formal 4 day a week contract back to the trustees. It was not for her and Stanley Jones to agree on their own. They wanted her to carry on with the same arrangement as always. The

reference to working in her own studio was only said as a fellow artist enjoying doing such and not that the Claimant should do that.

70. The Claimant accepted she became upset and did not therefore necessarily have an accurate recollection of the meeting. The meeting ended as the Claimant was not able to carry on.

Resignation

71. By email of the 2nd March 2016 the Claimant submitted her resignation to the Trustees. She said that recent events had made her feel that she had not been treated with care or respect. She had asked for a written contract many times but told it was not necessary as she had “unwritten contract for 4 days a week”. Her contract had not been honoured so it was now fundamentally a breach of contract. She was resigning with immediate effect. It was put to her in cross examination that there was no information given of “recent events” and eventually on a question being put by the Judge the Claimant accepted that the reader would not know what the recent events were and what had upset her.
72. In the bundle was disclosed an email the Claimant sent Emma James on the 2 March 2016 in which she stated, ‘I missed out the bit that Jen told me to put in ‘I would be considering constructive dismissal’ by mistake....Jen also advised me to use the words bullying, but I could do it.’
73. The Claimant was taken to an email she then sent Emma James on the 9th March in which she said “Getting constructive dismissal is hard work and not easy. And I might have screwed it up already with something I wrote in my letter of resignation”. She explained to the Tribunal she had spoken to Jennifer Scott-Reed that morning and had obtained advice as how to proceed. She had been advised it was important to put in the letter the reason for resigning.
74. The Respondent called Jennifer Scott-Reid (Jen) who runs Scott-Reid Solutions Ltd. Emma James had provided the Claimant with her details for advice. She explained to the tribunal that she is an HR adviser which includes advice on employment law. She teaches employment law to GPs and practice managers. She had helped employees in the past but not employers. She has a Masters in HR Management and Employment Law. In her witness statement she stated that she had advised the Claimant she had accepted changes to her contract and did not have a legal case against the Respondent. She denied the use of the word ‘bullying’ or that she helped the Claimant draft her resignation letter. She gave informal advice. She was angry with Emma and the Claimant at having being put in this position.

Being lied to, harassed, not valued and used.

75. When this allegations was put to her in cross examination the Claimant answered that the trustees had not lied to her. She had not felt valued by Terry Hanby and Stanley Jones. The allegation of feeling used was against Lorraine Chitson. The allegation of harassment was again against Lorraine with regard to the technicians pay and the skip. The tribunal does not accept the Claimant's interpretation of those matters.

Relevant Law

76. Section 1 of the Employment Rights Act 1996 provides:

Statement of initial employment particulars.

(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

77. The Claimant claims constructive dismissal. The test is still that laid down in *Western Excavation (ECC) Ltd v. Sharp* [1978] IRLR 27

'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.'

78. Conduct is repudiatory if 'viewed **objectively**, it evinces an intention no longer to be bound by the contract...' (*Lewis v Motorworld Garages Ltd* [1985] IRLR 465 CA) [emphasis added]
79. It is well established that the breach may be of the implied term of trust and confidence. This was expressed by the House of Lords in *Malik v BCCI* [1997] IRLR 461 that the employer shall not:-

“Without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”.

80. In *London Borough of Waltham Forest v. Omilaju* [2005] IRLR 35 the following guidance was given:

‘The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27.

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, 350. The very essence of the breach of the implied term is that it is 'calculated or likely to destroy or seriously damage the relationship' (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at p.464, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para. [480] in Harvey on Industrial Relations and Employment Law:

[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive

dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.'

81. It then stated:

'19 A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20 The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21

If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

Submissions

82. Written submissions were given and it is not proposed to recite those again in these reasons

Conclusions

Contract

83. There is no evidence that the Claimant had a 'zero hours' contract. The first time that expression appeared was in cross-examination of her. It does not represent the reality of the position between the parties. The documents, such as there are, show that the Claimant's hours had been increasing. Even Counsel for the Respondent accepts in her closing submissions that 'C's working life had settled down to a regular pattern by the last year of two of her employment' (paragraph 9). In her reply to the Claimant's submissions at paragraph 7 'there is no doubt as to the *pattern* of C's work in, at least, the last two years before her departure'

84. There is no written contract and it falls to the tribunal to determine the terms of the contract between the parties. The tribunal has concluded:

The Claimant was employed as Lead Tutor and Studio Manager

The employment commenced in 1999 and had been continuous until the Claimant's resignation on the 2 March 2016.

Under the contract the Claimant had an entitlement from in or about 2012 to work 4 days a week, the hours on those days varying with the needs of the business.

The 4 days a week, had been arranged by consent with the Respondent to accommodate caring obligations the Claimant had on a Monday.

The Claimant would be allocated 12 admin days to be spread out over the year which the Respondent had authorised funding for. That was in addition to admin the Claimant might undertake in association with a particular funded project

Constructive Dismissal

85. The tribunal has not found a series of acts by Lorraine Chitson or the trustees that amount to a breach of the implied term of trust and confidence.

86. From its findings the tribunal has concluded that in the majority of cases the incidents were dealt with at the time and were in no way damaging of the relationship in the way she suggests eg, the article, the Spanish student.

87. It is correct and the tribunal accepts that the Claimant was never given a written statement of terms and conditions. She had it has found a

contract for 4 days a week with variable hours. The Respondent trustees did not dispute that. At the meeting with Stanley Jones and Chloe Cheese this was discussed as was the Claimants job description. They agreed to discuss it with the trustees. They wished matters to continue as they had. They showed no intention no longer to be bound by the contract. The Claimant resigned before they had an opportunity to do so.

- 88. Lorraine Chitson was entitled to manage the studio and consequently the Claimant. The conduct alleged must be viewed 'objectively'. The tribunal does not accept the Claimant's view of it. The size and resources of the Respondent must be taken into account. This was not a large organisation with unlimited funds. Its income came solely from course fees. That had to be considered when allocating work. There had to be flexibility.
- 89. There was no fundamental breach by the employer. There was no intention no longer to be bound by the contract.
- 90. The meeting of the 1 March was not a 'last straw' as there was not a course of conduct. There was no fundamental breach committed by or on behalf of the employer at that meeting. The other trustees had to be consulted. The Claimant resigned before they were.
- 91. The Claimant resigned and was not dismissed. Here claim of unfair constructive dismissal must fail and is dismissed.

Employment Judge Laidler, Bury St Edmunds
Date: 14 July 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS